(3)

No. 03-1147

MOTION FILED

MAY 12 2004

In The

Supreme Court of the United States

DAVID ROEDER, et al.,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF SENATORS GEORGE ALLEN, TOM HARKIN, ERNEST F. HOLLINGS AND RICHARD C. SHELBY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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May 12, 2004

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Statement of Facts

Senators George Allen, Tom Harkin, Ernest F. Hollings and Richard C. Shelby (Collectively "The Senators"), by and through counsel and pursuant to Rule 37.3(b), hereby file their Motion for Leave to file *Amicus Curiae* Brief in this case. In support of their motion, amici make the following showing:

Pursuant to Rule 37(a), by letter dated March 30, 2004, amici sought written consent from Counsel of Record for Petitioner and Respondent. Petitioner's Counsel and Counsel for the Respondent the United States of America granted consent. Consent from the Islamic Republic of Iran has not been granted. The Senators' brief is being filed timely.

Nature of Interest

As members of the United States Senate, amici have a strong interest in the preservation of the Constitution's "single, finely wrought and exhaustively considered, procedure" for making laws. *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784 (1983). In this action, the District of Columbia Court of Appeals applied a "clear statement" rule in determining whether a Law passed by Congress and signed by the President abrogated an unratified executive agreement. This test raises separation of powers issues and creates a check on Congress' legislative powers not delegated by the Constitution. Accordingly, the outcome of this case will have a direct impact on the Senators.

The Senators respectfully submit that their Motion For Leave to File Amicus Curiae Brief should be granted.

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QUESTIONS PRESENTED

1. Does the "clear statement" rule for the abrogation of an unratified executive agreement violate the separation of powers doctrine?

2. Does the application of the "clear statement" rule frustrate Congress' clearly expressed intent to allow this suit to proceed?

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INTERESTS OF AMICI CURIAE[1]

The United States Constitution vests legislative responsibility in a bicameral Congress and requires that laws passed by Congress and signed by the President are the supreme law of the land. A judicially created test requiring Congress to expressly address the hundreds of unratified executive agreements before passing a comprehensive law upsets this careful allocation of authority by granting the President an ability to limit the scope of legislation beyond that delegated by the Constitution. As members of the United States Senate, amici have a strong interest in the preservation of the Constitution's "single, finely wrought and exhaustively considered, procedure" for making laws. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

STATEMENT OF THE FACTS

The Islamic Republic of Iran is a terrorist state that in 1979 kidnapped and tortured American citizens for 444 days. The United States Congress has repeatedly expressed the desire to allow suits against the Islamic Republic of Iran for its sponsorship of terrorism and for committing these egregious acts.

[1] A Motion to File an Amicus Brief is being filed simultaneously with this brief. The Office of the Solicitor General has consented to the filing of this brief by letter dated April 2, 2003. Consent for amicus briefs has not been obtained from the Islamic Republic of Iran. Counsel for Petitioners provided a copy of their Petition to Amici Curiae. No other person or entity authored this brief in whole or in part and no person or entity other than the Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Congress expressed this desire on at least four occasions. First, Congress passed the Antiterrorism Act in 1996 waiving sovereign immunity for terrorist acts sponsored by countries on the U.S. State Department's list of state sponsors of terrorism. Pub. L. No. 104-132 (codified at 28 U.S.C. § 1605(a)(7)) (Iran has appeared on the State Department's list since 1984). *Roeder v. Islamic Republic of Iran*, 195 F.Supp.2d 140, 160 (D.D.C. 2002). Second, the Flatow Amendment, named for a suit against the Islamic Republic of Iran, was passed in 1998 to provide redress for those victimized by Iran. *See* Antiterrorism Act at § 1605(e)(7); *See Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1 (D.D.C. 1999); *See also Cronin v. Islamic Republic of Iran*, 238 F.Supp.2d 222, 231 (D.D.C. 2002). In November 2001, Congress acted a third time and amended the Foreign Sovereign Immunity Act ("FSIA") to allow this specific suit to go forward, following at the District Court the United States' attempt to vacate the judgment on liability in favor of Plaintiffs. *See* H.R. 2500, 107th Cong., 1st Sess., the 2002 Appropriations Act for the Departments of Commerce, Justice, and State, the Judiciary. Pub. L. No. 107-77, 115 Stat. 748 (2001). In December 2001, not satisfied with these expressions alone, Congress acted a fourth time and amended a technical error in citing this suit's civil action number. *See* Department of Defense and Emergency Supplemental Appropriations Act, Pub. L. No. 107-117, 115 Stat. 2230 (amending Pub. L. No. 107-77 by striking '1:00CV03110 (ESG)' and inserting '1:00CV03110 (EGS)'). Despite these repeated and specific expressions by Congress, the United States Court of Appeals for the District of Columbia Circuit held that the suit was barred because Congress failed to expressly renounce the Algiers Accords, an unratified executive agreement signed by President

Carter in 1979 preventing suits against Iran arising from the hostage crises.

SUMMARY OF ARGUMENT

1. The Court of Appeals' application of the "clear statement" rule in this context frustrates the purpose behind separating the powers of government in the Constitution. Under the D.C. Circuit's unprecedented test, an executive agreement limits the field upon which Congress can legislate unless Congress expressly recites an intention to abdicate each individual executive agreement. This power goes beyond the Executive's Constitutional role and violates the intricate balance of power intended by the Founding Fathers.

2. Congress specifically acted in 2001 on two occasions with the intent of allowing this suit to go forward in order to compensate the victims of the Islamic Republic of Iran's terrorism. The specificity of the Amendments passed by Congress and their accompanying legislative history clearly reflect this intent. Despite this clear intent, the Court of Appeals wrongly gave a restrictive interpretation of this legislation leading to an unreasonable result not in accord with Congressional intent.

ARGUMENT

I. APPLICATION OF THE CLEAR STATEMENT RULE IN THIS CONTEXT VIOLATES THE SEPARATION OF POWERS DOCTRINE

The separation of powers in our government is a "sacred" principle that was deliberately implemented into the Constitution by the Founding Fathers. *Myers v. U.S.*, 272 U.S. 52, 116 (1926) *quoting* James Madison, 1 Annals of Congress, 581. A judicially created test which permits the Executive to unilaterally limit the authority of Congress to legislate is a serious erosion of Congressional authority and a distortion of the "sacred" balance enshrined in our Constitution.

The Court of Appeals below erroneously applied a "clear statement" rule in determining whether acts of Congress abrogated an unratified executive agreement. Under the "clear statement" rule adopted by the D.C. Court; a law passed by Congress and signed by the President can not abrogate an earlier executive action unless Congress clearly expresses the intention to overrule the executive action. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). The rationale for this rule flows from the canon of disfavoring repeals by implication, and such a canon is properly invoked when dealing with subsequent enacted Treaties or acts of Congress. *See Id.*, 437 U.S. at 190 (applying clear statement rule when analyzing two acts of Congress); *See also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (comparing a treaty with subsequent enacted legislation).

Application of the "clear statement" rule in examining an unratified executive agreement, however, violates the separation of powers doctrine by allowing the executive

branch to limit the scope and impact of Congress' power to legislate. *See Buckley v. Valeo,* 424 U.S. 1 (1976); *Morrison v. Olson*, 487 U.S. 654, 693 (1988). In effect, unless Congress specifically renounces a given executive agreement, Federal Courts must presume the legislation was not intended to be comprehensive. This limitation is worse than a simple preemption of a field because under this analysis Congress has to affirmatively act in order to avoid the limitation. This check on Congress' power to legislate violates the separation of powers carefully allocated in our Constitution. Congress is the only branch of our government with the power to legislate. The first provision in the Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

U.S. Const. Art. I, § 1. This power is broad and all inclusive. *See* U.S. Const. Art. I, § 9, cl. 18 granting Congress authority:

> [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof.

Significantly, Congress has the power "[t]o regulate Commerce with foreign Nations. . . . " *See* U.S. Const. Art. I, § 8, cl. 3. Congress' power in this field is exclusive and cannot be delegated to another branch. *Touby v. U.S.*, 500 U.S. 160, 165 (1991). Nor can this power be unilaterally usurped by another branch. *See Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991).

Congress should not be "required to investigate the array of international agreements that arguably provide some protection that it wishes to annul and then assemble a check-list reciting each one." *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 124 (2nd Cir. 2000). The United States literally has hundreds of unratified executive agreements in effect. *See* Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on Jan. 1, 2003 (compiled by Office of Legal Advisor, U.S. Department of State). These agreements touch on an incredibly wide variety of issues from the biological control of the Aedus Aegyph-mosquito in Brazil to regulation of satellite transmissions. *Id.* Executive agreements exist both with foreign states as well as trade organizations like The Group of Eight and the World Trade Association. *Id.* With increasing prevalence, these agreements address matters of domestic importance, and the majority impact commerce with foreign nations – an area of legislative prerogative.[2] These are clearly areas where the Founding Fathers said Congress had the final say. U.S. Const. Art. I.[3]

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[2] Under the D.C. Circuit's interpretation an agreement negotiated by a functionary at the World Trade Organization and another functionary in the executive branch would trump an act of Congress. Surely this was not the intent of the founding fathers.

[3] Significantly, Amici Curiae do not maintain that the executive can not enter into an agreement with a trade association or another country without Congressional approval. Instead, Amici Curiae simply maintain that an executive agreement that has not been ratified by the Legislature should not later be interpreted as a check on Congress' powers.

The "clear statement" rule when properly restricted to treaties and laws does not violate the separation of powers doctrine because *both* of these items receive legislative approval. Before becoming law, an act of Congress requires, at a minimum, approval by a majority of both the House of Representatives and the Senate. Likewise, a treaty requires the advice and consent of a super majority vote in the Senate. U.S. Const. Art. II, § 2, cl. 2. An executive agreement on the other hand receives no review and does not go through either door of Congress. Such an agreement neither originates in either house of Congress, nor is presented to Congress for its review. This Court has held that the requisites of bicameralism and presentment are unwaivable. *Chadha*, 462 U.S. at 458. This absence of Congressional review necessarily requires that an unratified executive agreement be treated with less deference.[4]

Legislative review and approval gives further credibility to Treaties and Laws and ensures a democratic imprimatur of their terms. This process allows for vast constituencies to participate in an open debate on the merits of a particular item, as opposed to an executive agreement which is normally passed in non-public meetings. *See* Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 Cal. L. Rev. 671, 723-724 (1998) ("Senate proceedings are open and public, whereas the process of foreign policy-making by the executive is generally secret."). As James Madison observed in The Federalist No. 49, Congress is uniquely

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[4] The silent approval of executive action relied upon in *Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981) is not present in this case. Congress has repeatedly voiced its opinion on this matter.

positioned to best serve and represent the American people in this debate because:

> The members of the legislature, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connexions of blood, of friendship, and of acquaintance, embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are most immediately the confidential guardians of their rights and liberties.

The Federalist No. 49 (James Madison).

The Founding Fathers clearly recognized Congress' unique position in facilitating a national debate and structured the Constitution to allow for this review. *See Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("[T]his system of division and separation of powers" was "deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power." (internal citations omitted)). By treating an executive agreement as the equivalent of a treaty or a law and applying the "clear statement" rule in this context, the Court of Appeals allows the executive branch to circumvent this important debate and limit the scope of Congress' powers.[5]

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[5] The plain language of the Supremacy Clause demonstrates that executive agreements should be treated as an inferior source of authority in comparison to treaties and laws:

(Continued on following page)

Furthermore, this Executive check on the breadth of Congress' legislative powers robs the American people of a fundamental protection of liberty. As stated by Justice Kennedy's concurrence in *Clinton v. City of New York*:

> Liberty is always at stake when one or more of the branches seek to transgress the separation of powers. Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.

524 U.S. 417, 450 (1998). This principle is equally emphasized in the Federalist papers:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced as the very definition of tyranny. . . . [T]he preservation of liberty requires, that the three great departments of power should be separate and distinct.

The Federalist No. 47 (James Madison).

> It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered

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> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .

U.S. Const. Art. VI. This reading is supported by the use of the terms agreements and compacts elsewhere in the text. *See e.g.*, U.S. Const. Art. I, § 10.

> by either of the other departments. It is equally evident, that neither of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.

The Federalist No. 48 (James Madison). The Court of Appeals' application of the "clear statement" rule in this context makes Madison's fear of one branch exerting an overruling influence over another's administration of powers a reality.

Accordingly, the "clear statement" rule is an inappropriate test in evaluating whether an act of Congress signed into law by the President trumps an unratified executive agreement. Such a burden on Congress gives the President the ability to limit Congress' constitutionally endowed legislative powers, and violates the separation of powers doctrine.

II. CONGRESS CLEARLY EXPRESSED THE INTENT TO ALLOW THIS SUIT NOTWITHSTANDING ANY OTHER AUTHORITY INCLUDING THE ALGIERS ACCORDS

Congress clearly intended for the 2001 amendments to allow this particular suit to proceed notwithstanding the Algiers Accords. The November 2001 Amendment clarified that the Islamic Republic of Iran's sovereign immunity was abrogated by specifically referencing this suit's civil action number. See H.R. Conf. Rep. No. 278, 107th Cong., 1st Sess. At 170. Within two months, Congress again articulated its position by the Amendment in December 2001. The Joint Explanatory Statement provided with the December Amendment states:

> **[N]otwithstanding any other authority**, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996 and the provision specifically allows the judgment to stand for purposes of award damages. . . .

H.R. Conf. Rep. No. 107-350 at 422-423 (emphasis added). Clearly, these Amendments evidence an intent by Congress to allow Plaintiffs, as victims of terror, to receive compensation from the Islamic Republic of Iran "notwithstanding any other authority."

The Amendments were added to the text of the antiterrorism provisions of the FSIA and accordingly should be interpreted to be consistent with their intended purpose. *See Holloway v. U.S.*, 526 U.S. 1 (1999) (statute should be interpreted in consonance with the provisions of the whole law). Congress' intent of allowing this suit to proceed is consistent with the dual purposes behind the 1996 Antiterrorism and Effective Death Penalty Act Amendments to the FSIA of punishing countries that sponsor terrorism and providing compensation to their victims. *See* Allison Taylor, *Another Front in the War on Terrorism? Problems with Recent Changes to the FSIA*, 45 Ariz. L. Rev. 533, 534 (2003). When the 2001 Amendments are viewed in light of this intent, it becomes clear that the 2001 Amendments should be interpreted as intending to allow this suit, notwithstanding any other authority – including the Algiers Accords. The interpretation proffered by the Court of Appeals that Congress intended only to waive sovereign immunity subject to the Algiers Accords has no basis in fact and is, quite simply, wrong. *See, e.g., Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)

(statutes should not be interpreted in a manner leading to an unreasonable result inconsistent with the spirit and intention of its makers).

CONCLUSION

Under the Constitution, there are only two permissible checks on Congress' legislative powers. First, the Executive is given a veto power by which it may remand a bill to Congress for further review. The second check is inherent in the Supreme Court which may review a law and determine its constitutionality. Application of the "clear statement" rule in this context creates a new and third check on Congress' legislative powers by granting the Executive the ability to limit the effect of a duly enacted law through executive agreements. This third check was not contemplated by the Framers and represents an unjustified restraint on Congressional power.

Action by the Court is needed now and not later, because application of the "clear statement" rule in this context would: (1) unreasonably restrain Congress in creating laws, in derogation of the separation of powers doctrine; and (2) frustrate Congress' intent to allow this suit against the Islamic Republic of Iran. Unless the Court grants the petition and declares this test unconstitutional, Congress will be unable to exercise its Constitutional role.

Therefore, the Court should address the constitutionality of this test at this time.

Respectfully submitted,

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